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No. 82-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, THE UNITED STEELWORKERS OF AMERICA, THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AND THE COALITION OF LABOR UNION WOMEN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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The American Federation of Labor and Congress of Industrial Organizations, a federation of 99 national and international unions, the United Steelworkers of America, AFL-CIO, the union that represents the Petitioner's employees, the International Union of Electrical, Radio and Machine Workers, the union litigating in *EEOC et al* v. *Emerson Electric Co.*, (C.A. 8 No. 82-1647-EM), the same issue as is presented in this case, and the Coalition of Labor Union Women (CLUW), an organization of approximately 12,000 individuals concerned with discrimination against women, particularly in the area of employment, file this brief *amici curiae* in support of Respondent with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is the first case to come before this Court concerning the application of the Pregnancy Discrimination Act ("PDA") of 1978, 42 U.S.C. § 2000e(k), the amendment to Title VII of the Civil Rights Act of 1964 passed in reaction to this Court's opinion in *General Electric Co.* v. *Gilbert*, 429 U.S. 125. Petitioner's central submission is that in passing the PDA, Congress inserted into Title VII a definitional gloss on the meaning of discrimination "because of . . . sex" which applies when female employees are adversely affected by a differential treatment based on pregnancy, but not when male employees are so affected. According to Petitioner, Congress had no quarrel with the "rationale" as opposed to the "holding" of *Gilbert*. Brief for Petitioner ("Pet. Br."), at (i). Rather, says Petitioner, "precisely what Congress did" in passing the PDA was to "mandate[] special, preferential treatment contrary to the principles of [Title VII] law" (Pet. Br. at 30), by giving different content to the prohibition on sex discrimination depending upon whether male or female employees are injured. *See, e.g.*, Pet. Br., at 9-10 (Properly construed, the PDA changed the law of Title VII only with respect to female employees and female applicants for employment."); *id.*, at 30-31 ("Congress [in the PDA] enacted legislation exclusively for the benefit of the female worker.").

That such a preference is squarely contrary to the basic presuppositions of Title VII can scarcely be doubted. From the outset, Title VII has been understood to "require[] that persons of like qualifications be given employment opportunities irrespective of their sex." *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544. This principle has not been limited to situations in which all women, or all men, are disadvantaged; in *Phillips*, for example, the policy differentiated between women with pre-school age children *and all other employees*, including

women without preschool age children.[1] Rather, the touchstone has been whether the practice in question comprises "treatment of a person in a manner which but for that person's sex would be different." *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 711. And, that principle is as applicable in the area of employment-related insurance and fringe benefits as in any other context. *Manhart*, *supra*, *id.* at 710.

To define discrimination "because of . . . sex" one way where a female employee's benefits are concerned and the opposite way where a male employee's benefits are concerned is surely to treat the man "in a manner which but for that person's sex would be different." *Manhart*, *supra*, *id.*, at 711. Consequently, while it is of course possible that Congress legislated in the manner Petitioner suggests,[2] this Court should demand overwhelming proof

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[1] Arguably, this Court has in one circumstance, involving race discrimination and not sex discrimnation, sanctioned a departure from this basic rule. *Steelworkers* v. *Weber*, 443 U.S. 193. In that case, "the legislative history of Title VII and the historical context from which the Act arose" convinced the Court that "an interpretation of [Title VII] that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute.'" *Id.*, at 201-202. The *Weber* court therefore concluded that "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action." *Id.*, at 207.

Petitioner's position in this case is quite different: the claim here is that Congress *did* "limit traditional business freedom" with regard to differentiations based on pregnancy, but did so only where female, and not male, employees are concerned. For this reason, as well as because the historical and contextual factors which were persuasive in *Weber* are not here present (see *infra*, pp. 5-12), *Weber* lends no support to Petitioner's argument that the PDA transformed Title VII into a statute that sanctions preferential treatment for women employees.

[2] If this Court were to determine that Congress did intend in the PDA to prefer women employees by applying to them alone a more favorable concept of unlawful gender-based differentation, it would then have to face the question whether the Act as thus

that Congress so intended before concluding that Congress worked such a seachange in the nature of Title VII's protections.

As we show in Part I of our Argument, *infra*, the history and wording of the PDA do not support the conclusion that Congress intended in the PDA to transform Title VII by incorporating into that statute a differentiation based upon sex. Rather, Congress made quite plain the legislature's fundamental disagreement with this Court's *analysis* in *Gilbert* (and not simply the result), and its intent to substitute for all Title VII purposes a conception of sex discrimination different from that stated in *Gilbert*. Further, members of Congress, in discussing the PDA, expressly and repeatedly rejected the view that Congress was legislating a preference for women workers. Instead, the PDA was understood as restoring in full the Title VII principle of equality of treatment the legislature believed had been disturbed in *Gilbert*.

Congress declared that where pregnancy differentiation in benefits is at stake, the same concept of sex discrimination would apply to male employees and to female employees. And Congress recognized that once that uniform definition is applied, the question whether a pregnancy distinction in medical coverage between the *spouses* of male employees and of female *employees* is to be considered discrimination between *employees* on the basis of sex could not be answered under the PDA alone. That question was seen to be one concerning the scope of Title VII coverage of dependents' fringe benefits generally, to be resolved by the courts on the basis of general Title VII principles. Since Congress expressly declined to resolve that question, it is futile to search the PDA deliberations

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amended is constitutional. *Compare, Mississippi University for Women* v. *Hogan*, —— U.S. ——, 50 L.W. 5068 (July 1, 1982); *Califano* v. *Goldfarb*, 430 U.S. 199; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, *with Schlesinger* v. *Ballard*, 419 U.S. 498; *Kahn* v. *Shevin*, 416 U.S. 351.

for any conclusive legislative intent upon the legality of exclusion or limitation of pregnancy-related medical coverage for employees' spouses.

In Part II of our Argument, *infra*, we explore the question Congress thus left open for judicial resolution. As we show, while there is little Title VII law on the question whether differentiation on the basis of gender between spouses of employees constitutes discrimination against employees based on sex, there is a well-developed line of cases in this Court on similar questions arising under the Fourteenth Amendment's equal protection clause. Under these cases, beginning with *Frontiero* v. *Richardson*, 411 U.S. 677, it is clear that gender-based distinctions in the benefits offered employees' spouses constitutes sex discrimination between the employees themselves. Since Title VII incorporates a prohibition upon gender-based distinctions if anything *more* strict than that imposed by the equal protection clause, the employment policy at issue in this case must be held to violate Title VII.

ARGUMENT

I. In Enacting the Pregnancy Discrimination Act, Congress Intended to Clarify for All Title VII Purposes That Discrimination Based on Pregnancy Is Discrimination Based on Sex.

The avowed purpose of the PDA as introduced in Congress on March 15, 1977, could not have been more clearly stated: "to counteract the Supreme Court's decision in General Electric versus Gilbert." United States Senate Committee on Labor and Human Resources, *Legislative History of the Pregnancy Discrimination Act of 1978*, 96th Cong., 2d Sess., ("Leg. Hist."), at 8 (remarks of Sen. Mathias). *See also, e.g., id.*, at 11 (remarks of Rep. Hawkins). The best starting point in understanding the intended reach of the PDA, then, is the pre-PDA opinions of this Court concerning the exclusion of pregnancy-related risks from benefit programs.

A. *Gilbert and Related Cases.* The first such decision was *Geduldig* v. *Aiello*, 417 U.S. 484. *Geduldig* did not concern the interpretation of Title VII, but, like this case, did involve a benefit program singling out normal pregnancies for lesser coverage. The three dissenting Justices' view of the situation presented there puts that case in perspective for present purposes:

> "By singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination. [417 U.S., at 501].

The *Geduldig* dissenters, relying on *Frontiero* v. *Richardson*, 411 U.S. 677, would, on the basis of the reasoning just quoted, have applied the heightened standard of judicial scrutiny applicable in constitutional cases concerning sex discrimination to the exclusion of pregnancy from a disability compensation program and have found the exclusion invalid. The *Geduldig* majority rejected that approach in terms:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classi-

> fication like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. [417 U.S., at 496 n.20]

Thus, *Geduldig* did not narrowly focus on the question whether exclusion of an *employee's* own pregnancy from a benefit program constitutes a gender-based classification of employees. Rather, since the plaintiffs' claim was based on the Constitution, the employment context of the differentiation was immaterial. The central conceptual question was, instead, whether exclusion of a gender-linked trait from an otherwise inclusive benefits program constitutes discrimination based on sex.

The question whether exclusion of a pregnancy-related risk from an otherwise comprehensive benefit program is a gender-based differentiation recurred, this time in a Title VII context, in *General Electric Co.* v. *Gilbert*, *supra*. The *Gilbert* majority relied heavily upon *Geduldig*:

> Section 703(a)(1) provides in relevant part that it shall be an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1).
>
> While there is no necessary inference that Congress, in choosing this language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former. Particularly in the case of defining the term "discrimination," which Congress has nowhere in Title VII defined, those cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII. We think, therefore, that our decision in *Geduldig* v.

> *Aiello, supra*, dealing with a strikingly similar disability plan, is quite relevant in determining whether or not the pregnancy exclusion did discriminate on the basis of sex . . . . *Geduldig* leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that *the exclusion of pregnancy from coverage under California's disability-benefits plan was not in itself discrimination based on sex.* [429 U.S., at 133, 135 (emphasis added).]

On the central, and ultimately determinative, question whether "an exclusion of pregnancy from a disability-benefits plan providing general coverage is . . . gender-based discrimination at all," then, the *Gilbert* majority found *Geduldig* "precisely in point." 429 U.S., at 136.

The two dissents filed in *Gilbert* both rejected the majority's conclusion that exclusion of pregnancy-related risks from a benefits program has nothing to do with sex discrimination. In an opinion for himself and Justice Marshall, Justice Brennan maintained that "it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'" *Id.*, at 149 (Brennan, J., dissenting). And Justice Stevens believed that because "it is the capacity to become pregnant which primarily differentiates the female from the male . . . the rule at issue . . . [b]y definition . . . discriminates on account of sex." *Id.*, at 161-162 (Stevens, J., dissenting).

The salient point for present purposes is that, for *both* the majority and the dissenters in *Gilbert*, the central issue remained the conceptual one concerning the characterization of a pregnancy exclusion from a benefits program earlier addressed in *Geduldig*.

B. *Congress' Reaction to Gilbert.* To the members of Congress who introduced and supported the PDA, the conceptual analysis of the majority in *Geduldig* and in *Gilbert* was incorrect and was, moreover, inconsistent with the basic statutory scheme of mandating equality of treat-

ment regardless of an employee's sex. This view was reiterated over and over again on the floor of Congress, and in the Committee Reports. For example, in introducing the bill, Senator Williams proclaimed:

> Mr. President, when an employer's plan provides protection in the event of virtually every conceivable disability but one, and that one can affect only women, it is an inescapable conclusion that such a plan by definition discriminates on the basis of sex. . . . Such a scheme of risk allocation is obviously discriminatory and not "gender neutral". . . . In so concluding, the Court has ignored the congressional intent in enacting Title VII of the Civil Rights Act . . . *to protect all workers from unjust employment discrimination.* . . . There cannot be a place for unequal treatment of men and women in a country that takes pride in its heritage of freedom and democracy. [Leg. Hist., at 2-4 (Mar. 15, 1977) (remarks of Sen. Williams) (emphasis added).]

Similarly, Rep. Hawkins, the principal sponsor of the PDA in the House of Representatives, believed that,

> [I]t seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy. . . [The] view . . . that a classification which harms only women and does so on the basis of a factor inextricably linked to gender is not discrimination against women just because not all women are affected . . . is contrary to any sensible approach . . . as Mr. Justice Stevens noted in his dissent in *Gilbert.* [Leg. Hist. at 23-24 (April 5, 1977) remarks of Rep. Hawkins).]

The Senate and the House Committee as well state the view that "the passages [quoted *supra*, p. 8] from the two [*Gilbert*] dissenting opinions correctly express both the principle and the meaning of Title VII." S. Rep. No. 95-331, 95th Cong., 1st Sess., at 2; *see also* H. Rep. No.

95-948, 95th Cong., 2d Sess., at 2 ("It is the committee's view that the dissenting Justices correctly interpreted the Act").

The amendment Congress devised to "counteract . . . *Gilbert*" follows naturally from the analytic error of that decision as the legislature perceived that error: Congress determined "to change the *definition* of sex discrimination in Title VII to reflect the 'commonsense' view and . . . to make plain that, under Title VII . . . discrimination based on pregnancy, childbirth, and related medical conditions is discrimination based on sex." S. Rep. No. 95-331, *supra*, at 3 (emphasis supplied). The express purpose of this definitional change is to "prohibit discrimination on the basis of pregnancy or conditions arising out of pregnancy for *all* employment-related purposes." (Leg. Hist., at 62) (Sept. 8, 1977) (remarks of Sen. Williams) (emphasis supplied).[3]

This explicit and complete congressional rejection of *Gilbert's* theoretical premises hardly comports with an intention to create a preference for female employees, and to otherwise accept that decision's analysis where male employees are concerned. Indeed, in enacting the PDA, Congress made clear its intent to perfect the general equality principle of Title VII. Congress was *not*, as Petitioner maintains, enacting special, preferential treatment for women employees.

Thus, from the outset of the congressional deliberations *Gilbert* was described as not only "a serious setback to women's rights" but *also* as a setback "to the development of antidiscrimination law under Title VII," (Leg. Hist.,

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[3] See also *id.*, at 3 (Mar. 15, 1977) (remarks of Sen. Williams); *id.* at 8 (Mar. 15, 1977) (remarks of Sen. Mathias); *id.* at 24 (April 15, 1977) (remarks of Rep. Hawkins); *id.*, at 74-75 (Sept. 16, 1977) (remarks of Sen. Bayh); *id.*, at 106 (Sept. 16, 1977) (remarks of Sen. Williams); *id.*, at 110 (Sept. 15, 1977) (remarks of Sen. Javits); *id.* at 166 (July 18, 1978) (remarks of Rep. Hawkins).

at 1 (Mar. 15, 1977) (remarks of Sen. Williams)), and as consistent with the "intent of Congress in enacting Title VII — . . . to protect *all individuals* from unjust employment discrimination . . . including pregnant women," (Leg. Hist., at 6 (September 8, 1977) (remarks of Sen. Williams) (emphasis supplied)). Members of Congress repeatedly stressed that "the touchstone of compliance with S. 955 is equality of treatment, and any policy which affects pregnancy, childbirth, or related conditions must apply equally to other types of disabling conditions as well . . . [T]his bill demands equal treatment and nothing more." Leg. Hist., at 83 (Sept. 16, 1977) (remarks of Sen. Stafford).[4] Consistent with this view, the bill's prime sponsors explicitly *rejected* the contentions made during deliberations on the bill (and now made once again by Petitioner in this case) that "we are doing pregnant women some kind of favor," maintaining instead that "what we are dealing with here . . . is . . . a discrimination which we should not accept." Leg. Hist., at 110 (Sept. 16, 1977) (remarks by Sen. Javits).

The treatment of one proposed amendment exemplifies the commitment of the PDA's sponsors to the equality principle that is the basis both of Title VII and of that Act: Senator Hatch proposed an amendment to the bill that would have limited the number of weeks of disability benefits available to pregnant women workers. Leg. Hist., at 96 (Sept. 16, 1977). He supported his proposal by characterizing the bill as "a bonus or benefit for pregnancy" (*id.*, at 97), and suggesting that "pregnancy dis-

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[4] *See also id.*, at 67 (Sept. 8, 1977) (remarks of Sen. Javits); *id.*, at 133 (Sept. 16, 1977) (remarks of Sen. Culver) (goal is "equal treatment without regard to sex for all workers,"); *id.*, at 170 (July 18, 1978) (remarks of Rep. Sarasin) ("This bill restores equity to the treatment of fringe benefits in employment under Title VII"); *id.*, at 184 (July 18, 1978) (remarks of Rep. Whalen) ("Title VII should protect all workers, pregnant or otherwise, from sex discrimination.")

ability coverage can be reasonably provided if we mandate that it be required for no more than 6 weeks in the normal pregnancy situations" (*id.*, at 100). Senator Williams spoke against the amendment:

> The hallmark of Title VII, and of this legislation, is that it would require that *all* American workers be treated fairly by their employers, without regard to their sex, except insofar as it would affect their ability or inability to work . . . . [W]e cannot, if we are passing a bill that deals with discrimination, create new discrimination. . . . [i]t would finally end up across the street in the Supreme Court, because we would be writing discrimination in a law that is designed to end discrimination. . . . . We are here to deal with that specific pregnancy disability, and we cannot, in dealing with that discrimination, create our own here on the floor. [Leg. Hist., at 103-104 (Sept. 16, 1978) (remarks of Sen. Williams) (emphasis supplied).]

Senator Javits echoed these remarks in arguing for rejection of the Hatch amendment:

> I think we are faced with a situation where we are asked to install discrimination in a bill which seeks to eliminate discrimination . . . [T]he basis for our bill and *the reason why it is in the civil rights statute* is that it is a negative thing. We do not want pregnancy *discrimination against . . .*" We are making it crystal clear . . . that this is what the Civil Rights Act includes. [Leg. Hist., at 106 (Sept. 16, 1977) (remarks with Sen. Javits) (emphasis supplied).]

The Hatch amendment was thereupon defeated, 72-13. Leg. Hist. at 124.

C. *Implications for this Case.* It is true, as Petitioner stresses (Pet. Br., at 13-19), that Congress' concern with the plight of working women was in large part the motivation for enacting the PDA; it is also true that Congress made an express and considered decision to ac-

complish its goal through an amendment in strict keeping with the overall equality principles of Title VII.

Both these points being true, Petitioner's statutory construction argument in this case is similar to that rejected in *United States* v. *Turkette*, 452 U.S. 576. In that case, the defendant argued that because, as the Court agreed, "the legislative history forcefully supports the view that the major purpose of [the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 & 1962] is to address the infiltration of legitimate business by organized crime [; a] point . . . made time and again during the debates and in the hearings before the House and the Senate" (*id.* at 591), the Court should infer that the Act "did not reach the activities of enterprises organized and existing for criminal purposes" (*id.*).

Just as the Court in *Turkette* rejected the "negative inference" (*id.*) argued for there as inconsistent with the overall structure of RICO, so should the Court reject, as inconsistent with Congress' considered decisions embodied in the PDA, the inference that because the major purpose of the bill is to protect women employees the PDA applies only when women employees are adversely affected. Particularly, when read in light of the legislative history summarized above, the language and structure of the amendment does not create the "negative inference" that the PDA does not alter the Title VII definition of sex discrimination where male employees are concerned.

As already noted, the PDA amendment to Title VII appears in § 701 of that Act which is headed "Definitions," certainly an unlikely location for a provision which, according to Petitioner, works a fundamental change in Title VII's equality principles. And, the first part of the amendment is in the form of a definition, general and unlimited: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the

basis of pregnancy, childbirth, or related medical conditions; . . . ."[5]

The second portion of the PDA—"and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ."—even if read as limited to "women employees", although its words are not so limited, in no way detracts from the generality and breadth of the definition portion.[6] Rather, the obvi-

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[5] Petitioner suggests that by inserting the PDA definitional phrase into the operational section here at issue, § 703(a)(1), 42 U.S.C. § 2000e(2)(a)(1), it is possible to demonstrate that the PDA applies only to an employee's *own* pregnancy. Pet. Br., at 11. The problem, however, is that the words defined in the PDA, "because of sex", do *not* appear in that precise sequential order in § 703(a)(1). Rather, that section makes it unlawful "to discriminate against any individual in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, religion, sex and national origin." If literalism were the touchstone, it would be considerably more literal to insert the PDA language into § 703(a)(1) by *leaving out* the intermediate words "such individual's", not used in the PDA, than by leaving in those words. (Indeed, it could be argued with some force that Congress may *intentionally* have left out the two words upon which Petitioner so heavily relies from its definition precisely to indicate that the definition applies *whether or not* the pregnancy in question is that of the individual employee.)

[6] It is worth noting in this regard that § 703(a)(1) protects an employee "with respect to *his* compensation, terms, conditions or privileges of employment." (Emphasis supplied.) If it were appropriate to imply into a statute purporting to protect against sex discrimination a right accorded one sex but not the other, one might read § 703(a)(1), because of the pronoun "his", as affording relief only to men. Obviously, this was not Congress' intent. The inference, from the reference to "work," that the second sentence of the PDA indicates an intention to protect only women employees, is no stronger, particularly since the sentence otherwise refers, in general terms to "women" and to "persons," not to "women employees" and to "other employees."

ous point of the latter is to particularize the former with regard to the situation that generated the PDA—exclusion of pregnancy coverage from employees' disability benefits. The second portion of the PDA, as befits a provision joined to the basic definitional provision with an "and," *adds* to the definition a specific illustration of how the bill is to apply in the common situation on which the legislature had focused.[7]

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[7] It must be remembered in evaluating the second portion of the PDA that Congress acted *before* this Court decided *Manhart, supra.* Consequently, it was not yet clear that under Title VII itself, a "difference in the cost of providing benefits for . . . classes," such as women, protected by Title VII is no defense to differential treatment of such classes in an employee-benefit plan or other employment-related program. *Id.* at 716. Nor had it been determined whether the Bennett Amendment portion of § 703(h), 42 U.S.C. § 2000e-2(h), insulated employee-benefit plans from sex discrimination charges, as the *Gilbert* opinion may have intimated. See, *Manhart, supra,* 435 U.S. at 713-14. Thus, while in retrospect it may seem that the definitional provision alone would have been sufficient to assure the specific results Congress intended, the Congress, which enacted the bill legislating without knowledge of the future development of Title VII law, chose to state in the second portion of the amendment that whatever that development, pregnancy exclusions were to be treated in a particular manner in two respects. First, that a functional comparability test is to be used in applying the PDA definition thereby negating any notion that as long as the costs of benefit coverage for men and for women or for pregnant people and non-pregnant people are comparable there can be no Title VII violation. And, second, that where the PDA otherwise applies to employee benefit plans, the Bennett Amendment does not negate the change in prior law accomplishd through the PDA. *See,* S. Rep. No. 95-311, *supra,* at 7; H. Rep. No. 95-948, *supra,* at 7.

We note in this regard that Petitioner has not yet absorbed the lesson of *Manhart,* and continues to maintain that fringe benefit plans which facially differentiate on the basis of gender can be valid "if employer contributions are equal for employees of both sexes." Pet. Br., at 37. *Compare,* Brief for the American Federation of Labor and Congress of Industrial Organizations in *Arizona Governing Committee* v. *Norris,* No. 82-52, at 11-30, in support of

Petitioner places great weight on the proposition that the Senate Report is contrary to the legislative history discussed above and to the import of the statutory materials just discussed. To the contrary, the explanation of the PDA we have given thus far tracks that of the Senate Report.

First, that Report both recognizes that "the basic purpose of this bill is to protect women employees," and declares that, nonetheless, the bill "does not alter the basic principles of Title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for Title VII purposes." S. Rep. No. 95-331, *supra, at* 5-6 (emphasis supplied). Thus, the Senate Committee made it quite clear that the definitional change applies "for Title VII purposes," and *not* only where "women employees" are concerned.

Second, the Senate Report goes on briefly to explore the interaction of this definitional change and existing Title VII principles regarding the questions as to dependents' benefits that might arise. The Report rejects any suggestion that the PDA standing alone means that "if the maternity costs of women employees were paid under a medical plan, the similar costs for wives of employees would also have to be covered." *Id.* at 43. But, the Report states too "the question whether an employer who does cover dependents . . . may exclude conditions related to pregnancy from that coverage *is a different matter.*" *Id.* at 6 (emphasis supplied). As to that "different matter," the Committee declined to express a conclusive view, noting that there had been no Title VII litigation in the past because such plans are "rare." *Id.* The Committee did, however, point to the appropriate analytic scheme for answering this question. Once the definitional change

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the conclusion that *Manhart* precludes a cost-aggregating approach to sex discrimination in fringe benefits.

made by the PDA had been accomplished, "the question would remain whether, under Title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents." *Id.*

* * * *

The upshot is this: The impetus for the PDA was Congress' concern for women employees. Congress proceeded to meet that concern, however, by way of a definitional change applicable for *all* Title VII purposes. Because of this change, the argument is not available to employers, as it would have been under the conceptual framework of *Geduldig* and *Gilbert*, that women dependents denied pregnancy coverage available for other medical conditions are not discriminated against because of their sex. Beyond denying employers that argument Congress declined to go. Whether or not discrimination among employees' dependents because of their sex is sex discrimination among *employees*, implicates, as Congress realized, more general Title VII principles and is therefore a question that was best left to the litigation process for final determination.

In the face of Congress' considered decision to outline a conceptual framework for considering cases such as this and not to venture further, a painstaking inquiry into congressional intent upon the specific question in this case is, it appears to us, futile. For this reason, we do not inquire into the statements made on the floor of the Senate [8] expressing individual Senators' views as to the appropriate judicial answer to the question at the intersection of the PDA and Title VII affecting dependents' benefits.[9] Rather, we proceed directly to the issue posed

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[8] The dependents' benefits issue apparently did not come up in the House of Representatives.

[9] In particular, we see no more, and probably less, significance in this regard in the floor statements of Senator Williams (Leg. Hist. at 80) as compared to those of Senators Bayh and Cranston (Leg.

by the Senate Report—*viz.*, whether male employees who receive coverage which on the basis of gender differentiates their spouses from the spouses of women employees are the victims of discrimination based on sex for Title VII purposes.

II. To Discriminate Between Employees' Spouses in Benefit Programs on the Basis of Sex is Necessarily To Discriminate On that Basis Between the Employees Themselves.

Once it is determined that the PDA definitional change applies in all Title VII cases, and not only where women employees are adversely affected, the question in this case comes down to this: Does it violate Title VII to provide male employees with a benefit program that differentiates

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Hist. at 75, 131). *See* Pet. Br. at 25-28. Senators Bayh and Cranston, who made statements supporting our view on the proper outcome of a case such as this, expressly recognized that, as the Committee Report had stated, the question was one to be decided by the courts, in light of the PDA, and not under the PDA alone; that is why Senator Bayh declined "to second-guess the courts" (Leg. Hist. at 73), and Senator Cranston expressed only "my own view" (Leg. List. at 131).

Senator Williams was, of course, the Chairman of the Senate Committee which had produced the Report discussed in the text. As such, he would surely not put himself in the position of compromising on the floor of the Senate the considered decision of the committee as a whole. It was for this reason, presumably, that, in the colloquy with Senator Hatch relied upon by Petitioner, Senator Williams was careful to limit his remarks to "income maintenance" programs (Leg. Hist. at 80) and to a demonstration that the "women affected by pregnancy" sentence does not so alter Title VII as to obviate the need to show discrimination based on the sex *of the employee*. Thus, Senator Williams' remarks on the floor of the Senate are best read as not reaching the question left open in the Committee Report. At any rate, even if read more broadly, Senator Williams' remarks are, in light of the Committee Report, simply his "own views," and no more authoritative "second-guess[ing] [of] the courts" than those of Senators Cranston and Bayh.

their spouses from the spouses of women employees on the basis of sex?

The Title VII law on this generic question is, outside the present pregnancy context, relatively sparse.[10] There is, however, a line of directly relevant cases decided under the Constitutional Equal Protection guarantees. *Frontiero* v. *Richardson*, *supra*; *Weinberger* v. *Wiesenfeld*, *supra*; *Califano* v. *Goldfarb*, *supra*; *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142.

Frontiero concerned "the right of a female member of the uniformed services to claim her spouse as a 'dependent' for the purposes of obtaining increased quarters allowances and *medical and dental benefits* [when] . . . a serviceman may claim his wife as a 'dependent' without regard to whether she is in fact dependent upon him. . . ." 411 U.S., at 678 (emphasis supplied). The Court held, 8-1, that "by according differential treatment to male and female members of the uniformed services . . . the challenged statutes violate the [equal protection guarantee of] the Due Process Clause of the Fifth Amendment. . . ." *Id.*, at 690-691. While there was substantial disagreement on the question of the standard to be applied under the Constitution in reviewing legislative distinctions based on gender, no member of the majority doubted that the differentiation in question *was* based on the gender *of the serviceman*—the employee whose benefits were in question. *Id.*, at 690; *id.*, at 691 (Steward, J., concurring); *id.*, at 691 (Powell, J., concurring). That the class of persons not paid dependents' benefits included both men and women (because many men had no dependents) was not considered relevant.

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[10] Commission Decision No. 70-513, 2 FEP Cases 515 (1970); Commission Decision No. 70-660, 2 FEP Cases 590 (1970); Commission Decision No. 70-660, 2 FEP Cases 590 (1970); Commission Decision No. 70-510, 2 FEP Cases 587 (1970); Commission Decision No. 71-1100, 3 FEP Cases 272 (1970).

For present purposes, the only pertinent distinction between *Frontiero* and this case is that here the gender differentiation is, in terms, between spouses, not between employees.[11] But, surely, *Frontiero* would have been decided the same way, and according to the same analysis, if the rule under attack had limited medical benefits for male spouses of employees rather than for spouses of female employees. Because only women have male spouses, such a scheme is simply another way of stating the limitation upon spousal benefits for women employees.

The Court next addressed gender-based differentiation in spousal benefits in two Social Security Act cases, *Weinberger* v. *Wiesenfeld*, *supra*, and *Califano* v. *Goldfarb*, *supra*. These cases both concerned Social Security Act sections providing benefits for surviving widows, but not necessarily for surviving widowers, of covered employees. In these cases, unlike *Frontiero*, the differentiation was in terms based on the gender of spouses, and not upon

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[11] As we established in Part I, *supra*, limitation of spousal pregnancy benefits from a medical benefits program is, for Title VII purposes, considered discrimination on the basis of the spouse's sex. Thus, the pregnancy aspect of this case is not pertinent at this juncture in the analysis; rather, this case must be seen as conceptually identical to one in which an employer has a less favorable plan for female spouses than for male spouses—for example, one providing a fifty dollar deductible for husbands and a hundred dollar deductible for wives.

Nor is the constitutional context of *Frontiero* and its progeny a pertinent line of distinction between this case and those. The standard of review applied in constitutional sex discrimination cases is *less* stringent than that applicable for race (*Craig* v. *Boren*, 429 U.S. 190), while the statutory protection accorded race and sex under Title VII is identical except for two circumscribed statutory limitations on the sex discrimination prohibition (the Bennett Amendment and the bona fide occupational qualification ("bfoq") provision, § 703(e), 42 U.S.C. § 2000e-2(e)). Consequently, unless one of those statutory exceptions is applicable (which no one has claimed to be the case here), sex-based discrimination among employees invalid under the constitution is unlawful under Title VII as well.

that of the employees themselves. Also, the cases concerned social security benefits, which are, unlike fringe benefits flowing directly from an employer, " 'noncontractual' " in nature. *Wiesenfeld, supra*, 420 U.S., at 646; *Goldfarb, supra*, 430 U.S., at 211.

In *Wiesenfeld*, seven of the eight participating members of the Court nonetheless saw the gender-based distinction at issue as one which "without sufficient justification differentiate[d] *among covered employees* solely on the basis of sex." 420 U.S., at 648. *See also, id.*, at 654-655 ("[t]he statutory scheme . . . impermissibly discriminates against a female wage earner") (Powell, J., concurring).[12]

The *Goldfarb* decision, however, saw the Court more divided on this question: The plurality in *Goldfarb*, maintaining that "*Wiesenfeld* is 'dispositive here'," held the section at issue "[p]lainly . . . disadvantages women contributors to the social security system as compared to similarly situated men" because it "provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical." 430 U.S., at 208. The concurring and dissenting members of the Court in *Goldfarb*, however, were of the view that because the covered employee "had no contractual right to receive benefits or to control their payment," nothing more than a "uniform tax obligation" was at stake as far as the covered employees were concerned. *Id.*, at 217-218 (Stevens, J., dissenting); *see also id.*, at 230, 240, 241 (Rehnquist, J., dissenting). But both the concurring and dissenting Justices saw this, and not the fact that the gender differentiation was in terms among spouses rather than employees, as the critical distinction between *Goldfarb* and *Frontiero*:

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[12] Justice Rehnquist saw "no necessity for reaching the issue whether the statute's purported discrimination against female workers violates the Fifth Amendment as applied in *Frontiero* v. *Richardson*. . . ." *Wiesenfeld*, 420 U.S., at 655.

> This case is . . . distinguishable from *Frontiero* v. *Richardson* . . . in the sense that social insurance differs from compensation for work done. While there is no basis for assessing the propriety of a given allocation of funds within a social insurance program apart from an identifiable legislative purpose, a compensatory scheme may be evaluated under the principle of equal pay for equal work. . . ." [430 U.S., at 241. (Rehnquist, J., dissenting); *see also id.*, at 217 n.1 (Stevens, J., concurring).]

The final case concerning spousal benefits is *Wengler* v. *Druggists Mutual Insurance Co.*, which involved death benefits under a workers' compensation program. The statute provided for automatic payment of death benefits to wives, but not husbands, of covered employees. This time, seven members of the Court relying on the plurality opinion in *Goldfarb* and the majority opinions in *Frontiero* and *Wiesenfeld*, agreed that there was sex "discrimination against working women", 446 U.S., at 147, and invalidated the gender-based distinction.

At this point, then, there is no doubt that *Frontiero* v. *Richardson* remains good law, and that, since gender-differentiation between spouses covered by a benefits program constitutes, because of the inevitable gender-linkage involved, sex discrimination among the covered employees (as least where the benefit is provided as a contractual right of employment, and not simply as a social insurance program), *Frontiero* could not be decided differently had the gender differentiation been between the spouses rather than the employees. Applying the same principles here, and combining them with the PDA definition, it becomes plain that, because the spouses of male employees are being discriminated against on the basis of sex by Petitioner's medical benefits program, there is necessarily discrimination on the basis of sex against the male employees themselves.

CONCLUSION

Because the denial or limitation of medical coverage for a spouse's pregnancies in an otherwise comprehensive dependent's medical benefits program discriminates against female spouses on the basis of their sex as now defined by Title VII, there was gender-based discrimination between male and female employees with dependents in Petitioner's medical benefits program. For this reason, the judgment below should be affirmed.

Respectfully submitted,

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